BEFORE THE FOREST PRACTICES APPEALS BOARD
STATE OF WASHINGTON

CITY OF OLYMPIA,	
Appellant,	**FPAB NO. 92-32**
v.	
STATE OF WASHINGTON, DEPARTMENT OF NATURAL RESOURCES, FOREST PRACTICES BOARD, DEPARTMENT OF ECOLOGY, MYRON STRUCK, GORDON BOE and H & H LOGGING,	**FINAL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER**
Respondents.	

This matter came on for hearing before the Forest Practices Appeals Board, William A Harrison, Administrative Appeals Judge, presiding, and Board Members Norman L. Winn, Dr Martin R. Kaatz, and Robert Quoidbach

This matter is an appeal by the City of Olympia from Department of Natural Resource's approval of a forest practices application by Stewart Hartman, Myron Struck and Gordon Boe.

Appearances were as follows.

1. Lynn R. Alfasso, Assistant City Attorney for the City of Olympia.

2 Cheryl A. Nielson, Assistant Attorney General for the Washington State Department of Natural Resources.

3 Argal D Oberquell, Attorney at Law for Stewart Hartman, Myron Struck and Gordon Boe

4 Patricia Hickey O'Brien, Assistant Attorney General for the Washington State Forest Practices Board.

The Washington State Department of Ecology did not appear.

The hearing was conducted at Lacey, Washington, on January 25 and 26, 1993 Gene Barker and Associates provided court reporting services

Witnesses were sworn and testified Exhibits were examined. The Board viewed the site of the proposal in the company of Judge Harrison and the parties. From testimony heard and exhibits examined, the Forest Practices Appeals Board makes these

FINDINGS OF FACT

I

The respondents, Hartman, Struck and Boe submitted a forest practices application to the respondent, Washington State Department of Natural Resources (DNR) on January 29, 1992 The proposal consisted of a harvest of 80% of the timber volume (50 to 60 acres) on an 80 acre parcel The site is located within the City of Olympia (City).

II

The applicants stated that they did not intend to convert the land to a use other than forestry, and that they would re-forest the site by planting Douglas fir. The DNR assigned the reference number FP 04 25956 to this application

III

Referring to a map drawn up cooperatively by DNR and Thurston County, the DNR determined that the site of the application was within an area likely to convert to urban development within a 10 year period This led to classification of the application as Class IV-General, meaning that review was required under the State Environmental Policy Act (SEPA), chapter 43 21C RCW, prior to commencement of logging The DNR informed the applicants that a SEPA checklist would be required to complete the application None was ever

submitted. The application was marked "disapproved" by DNR. The applicants appealed that disapproval here. The City was a party to that appeal.

IV

While the applicant's appeal of DNR's disapproval was pending, the applicants changed their approach. Realizing, now, that the site had been identified as likely to convert to urban development, they filed with DNR. 1) a Statement of Intent Not to Convert and 2) a Forest Management Plan. The Statement was accepted on October 12, 1992 The Forest Plan was accepted on October 21, 1992. Both were then considered in connection with the text of the original application These made up a complete application under the same reference number as before, FP 04 25956 The City objected to the application in that form, and proposed conditions to be added by DNR The DNR nevertheless granted the application without conditions on November 14, 1992. The Statement of Intent was recorded with the Thurston County Auditor. The application was processed by DNR as Class III, that is, as exempt from SEPA review The City now appeals that approval here.

V

The factors which suggest that the site is likely to convert to urban development within 10 years include these.

1. The property is within City limits.

2. The property is adjacent to a City park and within a rapidly growing residential area.

3. There has been a previous proposal by the owners, Struck and Boe, for residential development. This was not pursued because the City found the owner's environmental impact statement (EIS) to be inadequate. That, in turn, involved disagreement between the owners and the City relative to trees to be left standing.

4 The property is not assessed as forest land for tax purposes.

5 The City Comprehensive Plan designates the future use of the area for single-family residential

VI

The clearcut proposal will result in only a minimal increase in stormwater runoff from the site The property is predominantly flat, and there are no streams on it. It consists of well drained soil throughout, with the exception of a layer 30 inches below ground on the east, consisting of cemented till. Water would transport along the underground plane of the till In the extreme conditions of a 100 year storm, the likely increase in runoff would be from 1%-2% at peak and from 5%-10% over a 24 hour period This increase would not significantly affect the flow in the Wiggins Road drainage ditch which lies some 1000-1500 feet east of the site. The proposed reforestation would mitigate even these minimal effects. Standing water now on the property adjacent to the site's southeast corner is due to water diversion on that adjacent property, and is not due to runoff from the site.

VII

A City employee has seen a red-tailed hawk and fledgling on or near the site No nest has been discovered. The red-tailed hawk is neither a threatened nor endangered species It is a species known to the logging contractor who has agreed to DNR's request that any nest on the site be protected. It is likely that the forest proposal here would be more protective of wildlife habitat than the residential development called for in City planning.

VIII

The proposal will leave certain trees standing as a buffer which the City suggests are subject to being toppled by winds (windthrow) The prevailing southwest winds would probably leave any windthrown tree on the property, rather than the City's park located west of the site Even so, the proposal creates no specific danger of windthrow, and would be no different in that respect than the adjacent residential and park properties with their remaining trees

IX

The City urges that the proposed logging will have a deleterious appearance. We disagree. Original woodlands have been largely cleared to make way for residential development in this area. The cleared appearance of this property would be consistent with the surrounding area, even prior to reforestation of the site.

X

The DNR regards the "Statement of Intent Not to Convert" to be a legally binding obligation enforceable by sanctions The term of the statement is ten years It has been recorded with the Thurston County Auditor.

XI

The DNR does not regard the "Forest Management Plan" as legally enforceable, but only as an indicia of willingness to abide by the "Statement of Intent Not to Convert " The applicants, Hartman (timber operator), Struck and Boe (owners) have shown no deviation from the Forest Management Plan.

XII

Any Conclusion of Law deemed to be a Finding of Fact is hereby adopted as such From these Findings of Fact, the Board issues these.

CONCLUSIONS OF LAW

I

As a threshold matter, the State Forest Practices Board and Department of Ecology move for dismissal of themselves as parties, and dismissal of any issue involving the validity of any forest practices regulation. The City has challenged the validity of certain forest practices regulations as applied in the granting of this permit. The Forest Practices Board and Department of Ecology were joined, as co-authors of those regulations.

II

The Appeals Board has jurisdiction to review the validity of forest practices regulations on appeal from the grant or denial of a forest practices permit. Snohomish County v Department of Natural Resources, Thurston County Superior Court, No 89-2-01491-0 (1989) and Snohomish County v. Department of Natural Resources, FPAB Nos. 89-12 and 89-13 (1989) See also, Dioxin/Organochlorine Center v Department of Ecology, 119 Wn 2d 761 (1992). The Forest Practices Board and Department of Ecology motion for dismissal is denied.

III

The starting point for analysis of this matter is the Forest Practices Act, at RCW 76 09 050, which designates those forest practices requiring review under the State Environmental Policy Act (SEPA):

> *Forest Practices . . . a) On lands platted after January 1, 1960, b) on lands being converted to another use, c) on lands which, pursuant to RCW 76.09.070 as now or hereafter amended, are not to be reforested because of the likelihood of future conversion to urban development and/or d) which have a potential for a substantial impact on the environment*

At RCW 76 09 070, referred to above it provides

The forest practices regulations may identify classifications and/or areas of forest land that have the likelihood of future conversion to urban development within a ten year period The reforestation requirements may be modified or eliminated on such lands
(emphasis added)

IV

Applying the foregoing provisions of the Forest Practices Act to the facts of this case, the site in question has not been platted, nor do its owners propose to convert it to a use other than forestry Review under SEPA would therefore precede the logging only if 1) there is a likelihood of future conversion of the site to urban development within ten years, or 2) the proposal has a potential for a substantial impact on the environment The rules of the Forest Practices Board denominate these last two categories as Class IV-General and Class IV-Special, respectively We will first consider the Class IV-Special situation and, in turn, the Class IV-General likelihood of conversion to urban development within ten years

V

Class IV-Special The rule implementing the Class IV-Special provisions of the Act is WAC 222-16-050(1) It provides nine specific forest practices which require SEPA review It has not been shown that the logging proposed here is within any of these nine enumerated forest practices Therefore, DNR's approval was consistent with WAC 222-16-050(1) as currently written

Our ultimate conclusion on the Class IV-Special category is not grounded solely upon the scope of WAC 222-16-050(1) with its nine specific forest practices The City challenges the validity of that rule, as applied, urging that the forest practices approved here do, in fact, have the potential for a substantial impact on the environment under RCW 76 09 050 Were we able to find, in the evidence, a potential for substantial environmental impact, we would sustain the City's position Upon careful examination of the evidence we conclude, however, that the proposed

forest practices do not show a potential for substantial environmental impact We conclude that the DNR was correct in not classifying this application as Class IV-Special

VI

Class IV-General A Class IV-General application results whenever forest practices are applied for on lands where there is a likelihood of further conversion to urban development within ten years RCW 76 09 050, RCW 76 09 070 and WAC 222-16-050(2)(b) The initial designation by DNR of this property as within that category was correct

VII

A correct determination by the DNR that forest practices are proposed on lands with a likelihood of conversion to urban development in ten years has, until recently, had but one consequence That consequence was to invoke SEPA review By so doing, the DNR granted to local government a voice in the regulation of forestry on lands where the transition from forestry to urban use would soon occur Excepting in Class IV-Special situations and other circumstances not applicable here, local government is pre-empted from the regulation of forestry RCW 76 09 240 The ten year likelihood provision of RCW 76 09 050 and -070 operates as an exception to this pre-emption

VIII

In December, 1991, the Forest Practices Board, by rulemaking, provided for an alternative consequence to DNR's determination of likelihood of conversion in ten years The rule then adopted provides

> *A landowner that submits an application or notification in an area that has been identified as having a likelihood of future conversion to urban development within a ten-year period may request the department [DNR] to reconsider the identification if the landowner complies with (a) of this subsection and at least one from (b) or (c) of this subsection*

(a) The landowner submits a statement of intent not to convert to a use other than commercial timber operation for a period of ten years after completion of the forest practice The statement shall be on a form prepared by the department and shall indicate the landowner is aware of the provisions of RCW 76 09 060(3)(b), and

(b) The land is enrolled under the provisions of chapter 84 28, 84 33 or 84 34 RCW, or

(c) A written forest management plan for the land covering the next ten years has been reviewed and accepted by the department

WAC 222-16-060(5)

In effect, the rule affords a landowner the opportunity to negate the "likelihood" of conversion to urban use within ten years, which is the likelihood found by DNR in the first instance

IX

In this case, the DNR correctly determined that the landowners complied with the above rule, WAC 222-16-060(5) They did so by submission of a statement of intent not to convert under subsection (a) and an adequate forest management plan under subsection (c) The consequence of this determination was to prevent SEPA review under a Class-IV General classification, and render the application a Class III which is exempt from SEPA review RCW 76 09 050 Thus returned matters to the realm of state pre-emption where DNR was not obliged to accommodate the conditions requested by the City

X

The larger issue now urged by the City is that the application of the new rule, WAC 222-16-060(5) was inconsistent with the Forest Practices Act The City first contends, correctly, that the Act, at RCW 76 09 050 consigns forest practices on lands with a "likelihood" of conversion to SEPA review Next, the City contends that this likelihood has been found here initially, which is correct also Finally, the City contends that the "statement of intent" and "forest

management plan" are nonbinding and therefore purposeless For the reasons which follow, we disagree with this final point

XI

The document which is required by WAC 222-16-060(5) is denominated a "statement of intent" not to convert to a use other than commercial timber operation for a period of ten years The term "intent" is troublesome because, as pointed out by the City, it may reflect a transitory plan which is revocable by the landowner's unilateral change of heart, or by sale of the property to a different owner Conversely, the word "intent" could also be read to mean a permanent and unchangeable plan The dictionary defines "intent" as "purpose or design " *Websters Third New International Dictionary* This does little to resolve whether the purpose or design is transitory or permanent We conclude that the term "intent" within WAC 222-16-060(5) is ambiguous In resolving this ambiguity we look to the construction of the issuing agency ITT Rayonier, Inc v Department of Ecology, 91 Wn 2d 682, 686 (1978) That agency is the DNR In testimony before us, DNR has given its construction that the "statement of intent" is binding for ten years, that conversion in that time would be a violation of the Forest Practices Act, and that sanctions would be appropriate for conversion within ten years [1] We conclude that the Statement of Intent submitted in this matter is a binding administrative order which prevents conversion of the property to a use other than commercial timber operation for a period of ten years The recording of that document with the county auditor is sufficient to bind subsequent purchasers of the property [2]

[1] The text of WAC 222-16-060(5)(a) supports the construction given by DNR through reference to the moratorium on building permits for six years where no intention to convert is stated on the application RCW 76 09 060(3)(b) To this DNR added, in testimony, the appropriateness of civil penalties under RCW 76 09 170 We would add, also enforcement under RCW 76 09 140

[2] Without this recording, the result reached here could not be sustained Recording is mandatory

XII

The forest management plan is not binding but serves to support the binding statement of intent Moreover, the DNR retains its powers to regulate these forest practices to prevent harm to any public resource, including fish, wildlife, waters and public improvements Snohomish Co v Department of Natural Resources, FPAB Nos 89-12 and 89-13 (1989)

XIII

The rule allowing retention of urban lands in commercial timber production, WAC 222-16-060(5) was applied consistently with the Forest Practices Act The binding nature of the Statement of Intent and its recording with the county auditor successfully removed the initial determination of "likelihood" of conversion The application was properly classified as Class III

XIV

The City also contends that the Growth Management Act, chapter 36 70A RCW has changed, amended or repealed the Forest Practices Act In Weyerhaeuser Co v King County, 91 Wn 2d 721, (1979), the Supreme Court held that certain amendments to the Forest Practices Act could not change local government authority under the Shoreline Management Act (SMA), chapter 90 58 RCW, because they did not set forth the full text of the SMA sections being amended On this point we would observe that turn-about is fair play Just as the SMA must be amended to diminish local government powers, the Forest Practices Act must be amended to diminish the DNR's powers The proper forum for arguments on whether to amend statutes is the Legislature

XV

The appellants contend that they are vested to the forest practices regulations in effect at the time their application was filed with DNR on January 29, 1992 We disagree First, we note

that the DNR disapproved that application which was followed by appeal here Once an appeal is filed here the DNR loses jurisdiction to further grant, deny or condition the application An appealed application may be disposed of only by a) the agreed order of all parties entered by the Appeals Board, or b) the order of the Appeals Board following adjudicative proceedings The City of Olympia had not joined in any agreed order in the appeal of the January 29, 1992, application when DNR approved an application on November 14, 1993 [3] Neither had there been adjudicative proceedings We conclude that DNR therefore could only have acted, and did act, on a separate application from that filed in January, 1992 We agree with DNR that the text of the January application became, in legal effect, re-filed in October, 1992, when appellants sought for the second time to obtain DNR approval The filing of the "Statement of Intent" and "Forest Management Plan" in October, 1992, buttresses this conclusion We do not believe that assignment of the same reference number to the January and October applications renders them any the less two applications, rather than one The application at issue was filed in October, 1992, and vested the landowners to the forest practices regulations then in effect See Hull v Hunt, 53 Wn 2d 125 (1958) and Talbot v Gray, 11 Wn App 807 (1974) This includes the provision requiring seven wildlife trees per acre, WAC 222-30-020(11) which took effect on August 1, 1992 The permit should be conditioned accordingly

XVI

Respondent, Gordon Boe, urges that we have no jurisdiction to reach the merits of this dispute because of the timing of the City's service of its notice of appeal upon him We disagree

XVII

The Board's jurisdiction is set forth at RCW 76 09 220(8)(a)

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[3] The City subsequently did join in a Stipulated Motion for Dismissal in the appeal from the January, 1992 application in January 1993 FPAB No 92-14 The effect of this is to leave that disapproval as is not to convert it to an approval

> *Any person aggrieved by the approval or disapproval of an application to conduct a forest practice may seek review from the appeals board by filing a request for the same within thirty days of the approval or disapproval Concurrently with the filing of any request for review with the board as provided in this section, the requestor shall file a copy of his request with the department [DNR] and the attorney general The attorney general may intervene to protect the public interest and insure that the provisions of this chapter are complied with* (emphasis added)

The jurisdiction of the appeals board is thus invoked when 1) the appeals board and 2) the DNR and attorney general have received, respectively, the 1) original and 2) copies of the notice of appeal That has occurrred here, and the City has successfully invoked the jurisdiction of the appeals board

XVIII

Both the appellant, Mr Boe, and the City cite our rule of procedure which, in addition to the above requirements, states

> *(3) Concurrently with filing with the appeals board, copies of notices commencing any of the proceedings shall be served upon the permit applicant if that person is not the appellant, and all other parties* WAC 223-08-075

This does not impose a requirement for such service to occur within 30 days of the approval or disapproval While no doubt due process of law requires service on the applicant. it is that due process requirement alone which prompts our rule No statutory provision exists to constrain that service to 30 days Here, the approval was made on November 14, 1992 Despite the difficulty of discerning Mr Boe's signature on the application the City served Mr Boe on January 8, 1993 This was notice reasonably calculated to inform, and afforded Mr Boe the opportunity to be heard at the trial of this matter

XIX

We have examined the cases cited on the issue of service, namely Adkins v Hollister, 47 Wn App 381 (1987), Seattle v Public Empl Relations Comm'n, 116 Wn 2d 923 (1991) and Leson v Department of Ecology, 59 Wn App 427 (1990) These cases are distinguishable first because they interpret statutes governing appeal from an administrative tribunal while this matter concerns appeal to an administrative tribunal Second, wherever jurisdiction was found lacking, the court's reasoning stood upon an express statutory requirement for service within 30 days which is lacking here We conclude that service of the notice of appeal was sufficient, and that we are accordingly vested of jurisdiction in this matter

XX

Any Finding of Fact deemed to be a Conclusion of Law is hereby adopted as such From the foregoing, the Board issues this·

ORDER

The application of Stewart Hartman, Myron Struck and Gordon Boe is remanded to the Department of Natural Resources for conditioning consistent with the wildlife protection measures of WAC 222-30-020(11) and, as so conditioned, is affirmed

DONE at Lacey, WA, this 3rd day of March, 1993

William A. Harrison
HONORABLE WILLIAM A. HARRISON
Administrative Appeals Judge

FOREST PRACTICES APPEALS BOARD

NORMAN L. WINN, Member

DR. MARTIN R KAATZ, Member

ROBERT QUOIDBACH, Member

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